

P & K CO., LTD.
v.
OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT

IBLA 94-690

Decided January 26, 1998

Appeal from a determination of Administrative Law Judge Ramon M. Child affirming the issuance of a Notice of Violation, Cessation Order, and Notice of Proposed Civil Penalty Assessment, as modified, based on a finding that the operator had placed potentially hazardous materials on and in the topsoil of a surface mine reclamation area without obtaining approval for a revision of the surface mining permit. DV 93-3-R, DV 93-8-R, and DV 93-3-P.

Affirmed.

1. Surface Mining Control and Reclamation Act of 1977: Permits: Revisions—Surface Mining Control and Reclamation Act of 1977: State Regulation: Generally

Under section 773.17(b) of the Oklahoma program, a permittee must obtain a written revision before proceeding to deviate from the permit. Section 816.22(d)(4) of the Oklahoma program, which is based on OSM's regulations regarding soil amendments, does not constitute a blanket permission to unilaterally place materials on or in the topsoil without an approved permit revision.

APPEARANCES: Stephen W. Smith, Esq., Henryetta, Oklahoma, for P & K Co., Ltd.; John S. Retrum, Esq., Office of the Solicitor, U.S. Department of the Interior, Denver, Colorado, for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

P & K Co., Ltd. (P & K), has appealed from a determination rendered by Administrative Law Judge Ramon M. Child on June 8, 1994, affirming the issuance of Notice of Violation (NOV) No. 92-003-0081-01 (TV2) and Cessation Order (CO) No. 93-030-081-001 (TV2) by the Office of Surface Mining Reclamation and Enforcement (OSM) for the placement of fly ash on and in the reclaimed topsoil of the Pollyanna #2 mine area near Gowan, Oklahoma. Judge Child, however, reduced the amount of the civil penalty assessment recommended in Notice of Proposed Civil Penalty Assessment (NOPA)

No. 92-003-081-01 (TV2) from \$3,900 to \$920. P & K timely appealed from these determinations. For reasons set forth below, we affirm Judge Child's decision.

P & K is the holder of an Oklahoma Department of Mines (ODOM) permit, No. 84/86-4105, issued in January 1984 for the Pollyanna #2 mine, comprising about 55.5 acres. Soon after commencing its mining operations, P & K discovered a "water problem" at the mine. Water leaving the permit area through an intermittent stream channel, which ran through the northern end of the permit area and which had been largely reconstructed as a result of mining activities, had a low pH, a condition known as "acid water." The situation had resulted in enforcement actions, not at issue here, by ODOM and OSM which failed to cure the problem.

On September 5, 1990, OSM, ODOM, and P & K met at the OSM Tulsa Field Office to discuss the acid water problem. ^{1/} Due to the consensus of those attending the meeting that something had to be done, several possible strategies for remedying the problem were explored, including the application of fly ash.

Subsequent to the September 1990 meeting, P & K attempted to alleviate the acid water problem by a number of different approaches, including the building of a treatment plant. However, the treatment plant did not adequately treat all of the water passing through or off the permit area. After first contacting ODOM, P & K commenced placing fly ash within the permit area in June 1992. ^{2/} The process took about 2 months. P & K placed the fly ash within the constructed channel and on top of seep areas as a sealant to keep water in the channel from infiltrating the spoil and acidic groundwater from escaping. While OSM personnel observed this placement of the fly ash, they did not object or otherwise express concern. Afterwards, periodic testing of the water at the point where the channel exits the permit area showed a normal pH at or near 7.0.

P & K's action, however, resulted in complaints by citizens filed with both ODOM and OSM. For its part, ODOM took no action, characterizing the complaints as having "no substance." However, OSM conducted an inspection of the mine in October 1992. On November 13, 1992, OSM issued a Ten-Day Notice (TDN), No. 92-003-257-003 (TV4), notifying ODOM that P & K was in violation of the Oklahoma regulations under the following conditions:

(1) Placement of unauthorized fly ash in violation of OPRPR 773.17(b); (2) Erosion of diversion channels in violation of OPRPR 816.43(a)(2)(i); (3) Failure to protect topsoil resources in violation of OPRPR 816.22; and

^{1/} Jim Moncrief, director of the OSM Tulsa Field Office represented OSM; ODOM was represented by, among others, Bennie Cox, director of ODOM; and P & K was represented by Matt Richardson, its president, and his father, Kenneth Richardson.

^{2/} Fly ash, a by-product of burning solid fuels such as coal, tends to be highly alkaline and therefore able to neutralize highly acidic water. The fly ash used was obtained from a coal-burning power plant near Poteau, Oklahoma.

(4) Failure of pond to meet minimum performance standards in violation of OPRPR 816.46(f)(12) and (13).

After its own November 16, 1992, investigation conducted in response to the TDN, ODOM reported to OSM that the actions cited under conditions 1 and 3 were deemed necessary to alleviate the acid water situation and concluded that an NOV should not be issued based on these conditions. With respect to conditions 2 and 4, ODOM advised OSM that these conditions had already been or were in the process of being remedied.

By letter dated November 24, 1992, OSM informed ODOM that, in its view, ODOM's determination not to take remedial action with respect to conditions 1 and 3 was arbitrary and capricious. Accordingly, OSM issued NOV No. 92-003-0081-001 (TV2) on December 11, 1992, ordering P & K to remove the fly ash by January 12, 1993. An application for review of this NOV was filed by P & K on December 28, 1992.

It should be noted that, on January 18, 1993, P & K applied to ODOM for approval of a permit revision to allow placement of the fly ash within the permit area, but this application was not immediately acted upon. While the application for a permit revision was awaiting action, OSM, having granted an extension of the abatement date to February 12, 1993, reinspected the mine in March 1993 and issued CO No. 93-030-081-001 (TV2) on March 19, 1993, for failure to abate the violations cited in NOV No. 92-003-0081-001 (TV2). P & K filed an application for review of the CO on March 29, 1993.

Meanwhile, on December 28, 1992, OSM had issued NOPA No. 92-003-081-01 (TV2), proposing the assessment of a civil penalty in the amount of \$2,800 for violation of OPRPR 773.17(b) and a penalty of \$1,100 for violation of OPRPR 816.22. Thereafter, following an assessment conference conducted on May 24, 1993, OSM approved the proposed penalty assessments. P & K's application for review of this determination (together with a check in the amount of the assessed penalties) was received June 1, 1993. Subsequent to the filing of P & K's applications for review, ODOM, on July 9, 1993, gave limited approval to P & K's permit revision request, requiring P & K to remove the fly ash from the constructed channel but allowing some fly ash to remain within certain areas of the permit on the condition that it be covered with 2 feet of topsoil.

A hearing was held before Judge Child on November 1 and 2, 1993, at Tulsa, Oklahoma, to jointly review all three applications for review. ^{3/}

^{3/} Sometime prior to an OSM inspection on Sept. 9, 1993, P & K removed much of the fly ash from the permit area. Finding that the fly ash problem had been abated, OSM terminated the NOV. In addition, between May 20 and June 29, 1993, OSM and ODOM undertook a total of four separate enforcement actions based on imminent harm and grounded in the civil penalties action under review here. Those actions were reviewed separately by Judge Child in a decision rendered June 6, 1994, and are not involved herein.

At the hearing, P & K presented testimony fleshing out the circumstances surrounding application of fly ash within the permit area. Thus, the testimony disclosed that among the proposals considered at the September 1990 meeting was the application of massive amounts of fly ash to raise the pH level of water leaving the permit area. (Tr. 134-35.) The testimony also indicated that at least some of the participants in the discussion envisaged the application of fly ash to the permit area contemporaneous with the submission of a request for a permit revision describing the placement of fly ash. (Tr. 136.) Though an OSM representative was present, he neither expressed approval nor objection to the proposal. (Tr. 136, 210.)

Matt Richardson, P & K's president, testified that, after construction of the water treatment plant had failed to totally solve the problem of acid water leaving the permit area, he obtained verbal approval from ODOM Director Cox to apply fly ash within the permit area. (Tr. 72-73, 140-44, 178, 180, 210-11.) Cox testified that he did, indeed, give P & K verbal approval to proceed with application of fly ash both in the seep areas and in the drainage channel. He indicated, however, that he anticipated that P & K would apply for a written permit revision simultaneously with the placement of fly ash. (Tr. 136.) He also established a gross limit of 5 tons per acre on the amount of fly ash P & K could place within the permit area. (Tr. 144.)

Cox further testified that, while it was "rather usual" for ODOM to verbally authorize work to eliminate an environmental hazard without a prior permit revision, such actions have been allowed in the past to avoid the 60-day delay associated with revising a permit, under the expectation that the necessary permit revision would "catch up" to the remedial work. (Tr. 164.) We note that Cox's testimony on this last point was corroborated by OSM Reclamation Specialist Michael Lett who noted that, in the past, both ODOM and OSM had authorized remedial work prior to the actual approval of a permit revision.

With respect to the physical nature of fly ash, William Fene, an ODOM inspector, and Saeed Zahrai, a mining reclamation specialist, testified that the Soil Conservation Service, U.S. Department of Agriculture, considered fly ash to be an acceptable soil amendment when applied in a manner similar to that used with respect to agricultural lime. (Tr. 196, 204.) It was noted that fly ash has the same pH (12) as agricultural lime, which makes it highly alkaline. (Tr. 102-103, 134, 162.) Cox testified that application of agricultural lime as a soil amendment does not require a permit revision. (Tr. 151, 160.)

Fene also stated that OSM could not provide him with any documentation supporting the hazardous nature of fly ash as a soil amendment. (Tr. 180.) Lett admitted that OSM did not conduct any chemical analysis and did not have any documentation that it was hazardous prior to issuing the NOV. (Tr. 72-73.) However, Philip N. Reinholtz, a hydrologist employed by OSM, testified that, where large amounts of fly ash on the permit area was exposed to rainfall, areas in which the water could pond or saturate the soil would have a very high pH, which could burn or damage human skin.

(Tr. 93-96.) He also testified that the fly ash itself, while not containing any significant amounts of heavy metals or contaminants, was causing precipitation of metals in the channel. (Tr. 103-04.) He stated that, when he visited the site on July 15, 1993, he observed conditions indicating that fly ash was being carried off the permit area. (Tr. 106.)

On the other hand, Fene testified that, during his November 1992 inspection, he observed that the 1-1/2 to 2 acres of the permit area containing the added fly ash had been seeded and grass was growing, including root penetration into the fly ash and that the water leaving the permit area was acceptable. (Tr. 184-85, 190, 195-96.) Thus, the presence of fly ash beneath the topsoil did not appear to be inhibiting surface reclamation.

In his decision, Judge Child focused on whether OSM had established a prima facie case as to the validity of the NOV, CO, and NOPA, asking two initial questions with respect to issuance of the NOV:

1. Was a prima facie case established that P & K placed fly ash within permit area 4105 in violation of section 773.17(b) of the Oklahoma program?
2. Was a prima facie case established that P & K failed to protect topsoil resources in violation of section 816.22 of the Oklahoma program?

(Decision at 2.) Concluding that OSM had presented a prima facie case on both matters, Judge Child then concentrated on the following issues:

1. Does ODOM's verbal approval of P & K's placement of the fly ash satisfy the requirements of section 773.17(b)?
2. Does ODOM's past history of allowing remedial actions without prior written permit revisions invalidate the NOV?
3. Should OSM be estopped from issuing the NOV?
4. Was the fly ash used and necessary to promote vegetation or root penetration, and if so, does this fact invalidate the NOV?

(Decision at 3.) In a detailed analysis of the factual record, Judge Child determined each question in the negative and affirmed issuance of the NOV and the CO. Judge Child, however, reduced the points assessed under the NOPA for violation of section 773.17(b) from 48 points to 26 points, resulting in a penalty of \$600. (Decision at 16-17.) He also reduced the points assessed for violation of section 816.22 from 31 points to 16, resulting in a penalty of \$320. (Decision at 18-19.) There has been no challenge from OSM to these reductions.

The sole issue raised by P & K on appeal concerns whether Judge Child erred in failing to consider the application of fly ash as a valid soil

amendment under the regulations such as would not require formal permit revision. Thus, P & K states:

The trial judge did not rule whether ODOM made a valid finding whether fly ash is a soil amendment which did not require a permit revision. The validity of the subject violations must stand or fall on whether ODOM was justified in determining that fly ash was a soil amendment to prevent acid mine drainage, promote revegetation, and was not harmful to the topsoil * * *.

(Statement of Reasons (SOR) at 10.) Appellant asserts that the evidence supports a conclusion "that the application of fly ash was a valid application of a soil amendment which was not harmful to the topsoil and which promoted revegetation." (SOR at 12.)

In challenging P & K's basis for appeal, OSM asserts that ODOM never approved the fly ash as a soil amendment and argues that, regardless of the motive for application of fly ash, P & K's actions violate the Oklahoma program's requirement that a permittee obtain a permit revision prior to commencing activities not specified in the permit and that Judge Child so ruled.

In his analysis, Judge Child did, in fact, address the soil amendment issue raised by P & K at some length:

P & K argues that a permit revision is not normally required for the addition of a soil amendment which promotes vegetation and which is not harmful to the environment. It further argues that it did not violate section 773.17(b), because the placement of the fly ash constitutes an addition of such a soil amendment. Also, P & K contends that it did not violate section 816.22, because section 816.22(d)(4) of the Oklahoma Program allows for the use of soil amendments when necessary to establish vegetative cover, and because 816.22(d)(2) allows for the treatment of regraded land to promote root penetration when harm will not be caused to the redistributed material.

These arguments are unavailing because the fly ash was not placed to promote revegetation or root penetration, but was placed for the purpose of sealing the constructed channel and seeps and otherwise alleviating the acid water problem. The provisions of sections 816.22(d)(2) and (4) of the Oklahoma program, allowing for the addition of substances necessary to establish vegetative cover or root penetration, are not at issue in this case. While the record may show that the fly ash did not hinder revegetation and root penetration, there is no evidence that placement of the fly ash was necessary for these processes to occur.

* * * * *

Furthermore, assuming, arguendo, that the fly ash was used and necessary to promote revegetation or root penetration,

section 773.17(b)'s requirement that operations be conducted only in accordance with the permit package makes no exception for such soil amendments or treatments.

(Decision at 14-15 (footnotes omitted).)

For reasons explained below, we are in agreement with Judge Child's assessment of the situation.

[1] Under section 508 of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. § 1258 (1994), a mining operator must submit plans detailing reclamation and "necessary support activities" when submitting the permit application. Reclamation activities under the permit are held to general environmental standards set forth in section 515 of SMCRA, 30 U.S.C. § 1265 (1994). Included among those standards are: Minimizing the disturbances to the prevailing hydrological balance at the minesite and offsite areas by avoiding acid drainage and insuring that all toxic-forming materials are treated or disposed of to prevent contamination. See 30 U.S.C. § 1265 (b)(10) and (14) (1994).

In implementing SMCRA, the State of Oklahoma has adopted as section 773.17(b) of its regulatory program the following provision: "The permittee shall conduct all surface coal mining and reclamation operations only as described in the approved application, except to the extent that the Department otherwise directs in the permit." This language duplicates, except to identify its own regulatory agency, the wording found in OSM's regulations at 30 C.F.R. § 773.17(b).

In the preamble to the rulemaking adopting 30 C.F.R. § 773.17(b), OSM emphasized the importance of the permit in delineating the extent of the proposed actions:

Several comments were received to simply require operations to be conducted as described in the permit. The commenters suggested deleting the proposed word "only" and the proposed phrase "application, except to the extent that the regulatory authority otherwise directs in the permit." The commenters felt that these changes would eliminate ambiguity, confusion, and unnecessary language.

OSM has not changed this provision which emphasizes that the operation must be conducted in accordance with the approved permit, including permit conditions. OSM is not eliminating the word "only" since the application must be complete and accurate to be approvable. A permit revision must be approved by the regulatory authority if the operator wishes to deviate from the approved application and permit.

48 Fed. Reg. 44,344, 44,370 (Sept. 28, 1983).

As Judge Child noted, this Board has, in applying 30 C.F.R. § 773.17(b), frequently alluded to the requirement that mining occur

in conformity with the terms of the currently approved permit. Thus, in Turner Brothers Inc. v. OSM, 101 IBLA 327, 332 (1988), we held that

[i]n enforcing SMCRA, OSMRE is entitled to rely on the permit package as evidence of the conditions under which mining and reclamation have been approved and an operator's failure to obtain written documentation of permit changes from a State regulatory authority exposes a permittee to liability under the Act.

(Emphasis added.) To similar effect was the decision in Turner Brothers Inc. v. OSM, 92 IBLA 381, 388 (1986), wherein the Board noted that not only did the regulations not "provide for oral addenda," but they affirmatively required that "[a]ny change from an approved permit, no matter how minor, should be documented." (Emphasis added.) Accord, Rith Energy Inc., 101 IBLA 190, 194 (1988); B & J Excavating Co. v. OSM, 89 IBLA 129, 135 (1985). Thus, as Judge Child noted, "[U]nless and until P & K received an approved permit revision from ODOM allowing placement of fly ash within the permitted area, P & K's placement of the fly ash was in violation of section 773.17(b) of the Oklahoma program." (Decision at 12.)

Appellant argues, in effect, that notwithstanding the requirements of section 773.17(b) relating to conforming operations to the terms approved in the permit, section 816.22 of the Oklahoma program, which regulates a permittee's actions regarding the topsoil and subsoil disturbed within the permit area, expressly permits use of soil additives without first seeking permit modification.

The OPRPR section 816.22 is also a verbatim adoption of OSM's regulation in this matter, 30 C.F.R. § 816.22. Appellant specifically refers to subsection (d)(4) to support its assertion that use of fly ash required no permit amendment. That subsection reads: "Nutrients and soil amendments shall be applied to the initially redistributed material when necessary to establish the vegetative cover." Contrary to P & K's assertions, we believe that this provision is clearly inapplicable herein.

First, as Judge Child found, the application of fly ash in this case was simply not done in association with the initial redistribution of the topsoil and subsoil in the permit area for the purpose of establishing vegetative cover. Indeed, the evidence is clear that the application of fly ash was made independent of any redistribution of top soil. Second, there is no evidence that placement of the fly ash was necessary to establish vegetation or even done for this purpose. Rather, the evidence shows that the purpose of applying the fly ash was to counteract an acid water problem by sealing areas within the constructed channel to keep water from infiltrating the spoil as well as remedying the problem associated with the seeps in the area.

As an examination of the history behind 30 C.F.R. § 816.22 shows, this regulation was not intended, as P & K argues, to be construed as a blanket consent for a permittee to unilaterally apply soil amendments as

the permittee saw fit without any permit revision. Thus, the initial version required soil tests by a qualified laboratory for the purpose of determining initially what soil amendments were necessary to ensure revegetation. See 44 Fed. Reg. 14,902, 15,397 (Mar. 13, 1979) (regulation originally codified as 30 C.F.R. § 816.25 (1979)). The determination and recommendation of soil amendments were construed to be part of the reclamation process.

In 1982, OSM proposed to amend the regulations relating to topsoil protection to allow more flexibility in developing reclamation rules which would be consistent with local soils, climate, and topography. 47 Fed. Reg. 10,742 (Mar. 11, 1982). In particular, OSM proposed deleting the soil nutrient and amendment provision. Id. In response to a number of comments received, OSM instead rewrote that provision to authorize "the regulatory authority to require the use of nutrients and soil amendments on the initially redistributed materials in amounts necessary to establish the vegetative cover." 48 Fed. Reg. 22,092, 22,098 (May 16, 1983).

Thus, 30 C.F.R. § 816.22 now makes it the responsibility of the regulatory authority, in this case, ODOM, to prescribe soil nutrients and amendments which it deems "necessary to establish the vegetative cover." There is, however, nothing to suggest that this regulation waives the requirement that permittees file permit revisions prior to deviating from specified reclamation plans. This is particularly so where, as here, the "soil additive" being proposed has the potential, at least, for adversely affecting the immediate and nearby environment. We must conclude that Judge Child's rejection of P & K's attempt to justify the use of fly ash as a soil additive, in the confines of the record disclosed in this appeal, was manifestly in accord with both the evidence and the law.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, Judge Child's determination is affirmed.

James L. Burski
Administrative Judge

I concur:

Gail M. Frazier
Administrative Judge

